

2:16-cr-00100-GMN-CWH

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3  
4 UNITED STATES OF AMERICA, )  
5 Plaintiff, ) Case No. 2:16-cr-00100-GMN-CWH  
6 vs. )  
7 JAN ROUVEN FUECHTENER, )  
8 Defendant. ) MOTION HEARING  
9  
10  
11  
12

13 TRANSCRIPT OF PROCEEDINGS

14 THE HONORABLE GLORIA M. NAVARRO,  
15 UNITED STATES DISTRICT JUDGE  
16  
17  
18

19 APPEARANCES: See Next Page

20 DIGITALLY RECORDED: Liberty Court Recorder  
21 11:12 a.m.

22 TRANSCRIBED BY: PATRICIA L. GANCI  
23 (702) 385-0670

24 Proceedings recorded by electronic sound recording, transcript  
25 produced by mechanical stenography and computer.

2:16-cr-00100-GMN-CWH

1 APPEARANCES:

2 For the Plaintiff:

3 **ELHAM ROOHANI, AUSA**

4 **CRISTINA D. SILVA, AUSA**

5 UNITED STATES ATTORNEY'S OFFICE

6 501 Las Vegas Boulevard South, Suite 1100

7 Las Vegas, Nevada 89101

8 (702) 388-6336

9 For the Defendant:

10 **JESS R. MARCHESE, ESQ.**

11 LAW OFFICE OF JESS R. MARCHESE

12 601 South Las Vegas Boulevard

13 Las Vegas, Nevada 89101

14 (702) 385-5377

15 **MICHAEL W. SANFT, ESQ.**

16 SANFT LAW

17 228 South Fourth Street, 3rd Floor

18 Las Vegas, Nevada 89101

19 (702) 497-8008

20 ALSO PRESENT:

21 Samira Barlow, Pretrial Services Officer

22

23

24

25

2:16-cr-00100-GMN-CWH

1 LAS VEGAS, NEVADA; TUESDAY, APRIL 19, 2016; 11:12 A.M.

2 ---oo---

3 P R O C E E D I N G S

4 COURTROOM ADMINISTRATOR: This is the time set for the  
5 motion hearing regarding first motion of review and amend the  
6 order of detention in the matter of -- in the case of  
7 2:16-cr-00100-GMN-CWH, the United States of America versus Jan  
8 Rouven Fuechtener.

9 Counsel, your appearances, please.

10 MS. ROOHANI: Good morning, Your Honor. Eli Roohani  
11 and Cristina Silva on behalf of the United States.

12 THE COURT: Good morning, Ms. Roohani. Good morning,  
13 Ms. Silva.

14 MS. SILVA: Good morning.

15 MR. MARCHESE: Good morning, Your Honor. Jess Marchese  
16 and Michael Sanft on behalf of the defendant, who is present and  
17 in custody.

18 THE COURT: Good morning, Mr. Marchese. Good morning,  
19 Mr. Sanft.

20 MR. SANFT: Good morning, Your Honor.

21 THE COURT: And how do we pronounce the defendant's  
22 last name?

23 MR. MARCHESE: Fuechtener, correct?

24 THE DEFENDANT: Fuechtener.

25 THE COURT: Fuechtener. Okay.

2:16-cr-00100-GMN-CWH

1                   Fuechtener? Is that close? Okay. Fuechtener. Good  
2 morning, sir.

3                   All right. Well, this is the time for a motion hearing  
4 that was filed by the defendant appealing from the magistrate  
5 judge's detention order. On March 14th, Mr. Fuechtener --  
6 Fuechtener, you were arrested pursuant to a criminal complaint.  
7 On March 15th you had your initial appearance in front of Judge  
8 Leen. On March 16th, the next day, you appeared before Judge  
9 Leen again for a detention hearing, and you were ordered  
10 detained pending trial. She found by clear and convincing  
11 evidence that you are a danger to the community, a finding that  
12 does require detention pending trial.

13                  Then on March 30th you were indicted on a criminal  
14 indictment by the federal grand jury here in the District of  
15 Nevada, which is on the Docket at Number 12, and April 6th you  
16 were arraigned in front of Judge Hoffman. Today you are seeking  
17 a revocation -- the revocation of that order, the appeal of that  
18 order, and to be released on bond.

19                  Now, just to be clear, on an appeal of a detention  
20 order, pursuant to Title 18, United States Code Section 3145(b),  
21 this court does perform a de novo review, so brand new review.  
22 Pursuant to 3142(f), the court has to determine whether any  
23 condition or set of conditions, combination of conditions, will  
24 reasonably assure, number one, your appearance. The appearance  
25 of the defendant is required. Number two, the safety of any

2:16-cr-00100-GMN-CWH

1 other person in the community.

2 Now, the -- previously Magistrate Judge Leen did find  
3 that you were a danger to the community, but not a flight risk.  
4 The Government is -- is now stating that they still believe that  
5 you are also a flight risk. And since this court does review  
6 everything *de novo*, that's also a finding that I will be making  
7 today as well, is whether or not you're a flight risk even  
8 though that was already addressed earlier.

9 Also pursuant to Section 3142(e)(3), certain offenses  
10 do create a rebuttable presumption that no condition or  
11 combination of conditions will reasonably assure the appearance  
12 of a person who's -- who's required to be in court and for the  
13 safety of the community. Here, in this case the defendant is  
14 facing at least one count alleging an offense involving a minor  
15 victim, I think in fact there are three, Title 18, United States  
16 Code Section 2252A and 2251(d).

17 So I saw that the Government did state that the  
18 rebuttable presumption applies. Also saw that Magistrate Leen  
19 had found that a rebuttable presumption applied even before  
20 there was an indictment. Now there is an indictment. I didn't  
21 see in the Defense counsel's motion or reply what your position  
22 was on whether the rebuttable presumption applies.

23 MR. MARCHESE: We do take the position that it applies,  
24 but we take the position that we can overcome it, Your Honor.

25 THE COURT: All right. So there's no dispute that the

2:16-cr-00100-GMN-CWH

1 rebuttable presumption applies.

2           Then the burden of the persuasion still remains with  
3 the Government, but the application of the presumption does have  
4 the effect of shifting the burden of the production to the  
5 defendant.

6           To avoid detention, the defendant will rebut the  
7 presumption of detention using four factors pursuant to Section  
8 3142(g). The court will be looking at, number one, the nature  
9 and circumstances of the offense, including whether the offense  
10 is a crime of violence or involves a firearm; number two, the  
11 weight of the evidence against the defendant, and now we have  
12 the indictment; number three, the history and characteristics of  
13 the defendant, including the characteristics of the defendant,  
14 the physical and mental condition of the defendant, family ties,  
15 employment, financial resources, length of residence in the  
16 community, community ties, past conduct, history relating to  
17 drug or alcohol abuse, criminal history, or any other records  
18 regarding his appearance at prior court appearances; and, number  
19 four, the fourth category is the nature and seriousness of the  
20 danger to any person or the community that would be posed by the  
21 person's release.

22           So there are two different questions, whether or not  
23 the defendant poses a danger to the community, and the  
24 Government must establish that by clear and convincing evidence.  
25 The second question is whether the defendant is a risk of

2:16-cr-00100-GMN-CWH

1 nonappearance, and the Government must prove that by a  
2 preponderance of the evidence. The Government doesn't have to  
3 prove both. Either one of those would be sufficient for the  
4 defendant to be detained.

5 So this is the defendant's motion. So let's go ahead  
6 and start with the defendant.

7 MR. MARCHESE: Thank you, Your Honor.

8 It's our position that both factors are not met here.  
9 First of all, Mr. Fuechtener is not a danger to the community,  
10 and second that he is not a flight risk. I'll go with the  
11 flight risk first because I think that's the easier argument.  
12 Although you're a different court and you can make whatever  
13 ruling Your Honor sees fit, obviously the magistrate court found  
14 that there was no risk of flight with my client, Jan.

15 One of the things that I put in my motion was a little  
16 bit of the history of this case. There was approximately a six-  
17 to seven-week delay in which the charges were actually filed,  
18 the complaint, and the search warrant. Within that six- to  
19 seven-week time period, Mr. Fuechtener had every opportunity to  
20 flee the country. As the Government has correctly pointed out,  
21 he is not a citizen of the United States, although he does  
22 legally reside here. He had every opportunity to flee the  
23 country, but he did not. And I would submit to the court that  
24 the reason he did not is because guilty people flee and innocent  
25 people stay.

2:16-cr-00100-GMN-CWH

1                   So he had every opportunity to do so, and he did not.  
2 He has significant contacts with the community. He has -- as is  
3 has pointed out in the pretrial services report, he has large  
4 economic interests locally here. He did have a show. Obviously  
5 there's been some issues with that, but he has a lot of personal  
6 contacts. His husband is present in the courtroom here today.  
7 They are legally married. That's one of the issues that we  
8 brought up in our opposition which we will get to momentarily.

9                   I've spoken with his husband. He will also serve as a  
10 third-party custodian should the court see fit, as that will be  
11 a term and condition that the court might want to put onto  
12 Mr. Fuechtener if the court is -- decides to release him here  
13 today.

14                  In addition, he's also willing to give his passport to  
15 the court. He is also -- he doesn't have it in court today, but  
16 his husband has represented there will be no problem getting it  
17 here immediately over to pretrial services. In addition, we  
18 would submit that GPS monitoring would be a perfect avenue for  
19 him. He will go nowhere. He can have limited access to  
20 computers. He is ready, willing, and able to comply with any  
21 court orders in reference to that.

22                  Also, as the court can see from the pretrial services  
23 report, he is a man of means. So if the court -- typically in  
24 this jurisdiction I don't see it very often. I have seen it in  
25 the past, but if the court would like to have him post some sort

2:16-cr-00100-GMN-CWH

1 of a cash bond to make sure that he has an incentive, so to  
2 speak, to appear in court, that is also something that we would  
3 ask the court to entertain.

4 He has no criminal history whatsoever. So there's no  
5 issue there. So we would submit that he is not a risk of flight  
6 based on his ties to the community, lack of criminal history,  
7 lack of failures to appear, obviously given the fact he has no  
8 criminal history. So those are all reasons that he is not a  
9 risk of flight, and that's why we agreed with Judge Leen's  
10 determination that he was not a risk of flight.

11 The obvious issue that Judge Leen had was this issue  
12 that Mr. Fuechtener is supposedly a danger to the community. We  
13 respectfully disagree with the magistrate's ruling, and that's  
14 why we appealed this matter up to Your Honor. The first thing  
15 that I would bring up is that anecdotally I have seen in this  
16 particular jurisdiction and typically -- every case is  
17 different. Every defendant is different. And every judge is  
18 different, but typically I see that people situated such as my  
19 client are in fact released on pretrial services.

20 So I guess the real question is what is it about Jan  
21 that makes him such a danger to the community. Now, obviously  
22 the nature of the charges are severe. I can't change that. I  
23 would like to. There's a point in time when obviously we'll  
24 have the opportunity to argue that in court. Today is not  
25 necessarily that time. It is just to see if he's a danger to

2:16-cr-00100-GMN-CWH

1 release to the community.

2 Now, the issue here really about this case is whether  
3 or not you can put Jan behind the keyboard of a computer. There  
4 have been no admissions in this case. There have been some  
5 issues with the IP address coming back to my client's address,  
6 but the important thing to note and I brought it up is that this  
7 is a huge property. This is not your typical cookie-cutter Las  
8 Vegas tract home. This is 1.1 acres. The actual home itself is  
9 9,000 square feet. There is a pool house which is actually as  
10 large as many residences of, you know, your average home in Las  
11 Vegas. It's about 2,200/2,400 square feet. There's a huge  
12 garage. There are about 35 different electronic devices taken  
13 in the search, but the important part here is where these  
14 particular items were found and who was coming in and out of the  
15 residence.

16 We can certainly show the court that there were several  
17 people coming in and out of this home. Mr. Fuechtener is a very  
18 social man, for lack of a better term. There was several  
19 overnight guests, and I even pointed out to the court that on  
20 the date and time of the search warrant there was another  
21 individual staying overnight.

22 Further, and it is -- that's buttressed by the reports  
23 by the FBI, there was an individual staying in the pool house  
24 just hours before the search warrant was conducted. And that's  
25 a very --

2:16-cr-00100-GMN-CWH

1                   THE COURT: Joel Rosales. Is that who you're referring  
2 to?

3                   MR. MARCHESE: No, Mr. Rosales was an overnight guest.  
4 The actual individual who was staying in the pool house, his  
5 name is not put in the 302s, but my investigator was actually  
6 able to find this individual. It's a Mr. Correia. Mr. Correia  
7 actually will admit and will also be supported by Mr. Rosales  
8 that Mr. Correia was, in fact, in the pool house the night  
9 before. And that's important because that's where the greater  
10 majority of these -- this elicit material is found, in the pool  
11 house.

12                  Coincidentally, although the FBI was unable to open any  
13 of the videos, there are four videos or what was purported to be  
14 four videos, four videos that were on a lock screen that based  
15 upon their names of the -- of the files could be -- there could  
16 be a very good argument made that that was in fact child  
17 pornography. So this -- we have --

18                  THE COURT: Wasn't there one that was on pause?

19                  MR. MARCHESE: And that's what I'm referring to. I  
20 don't believe that the FBI was able to extract it. They -- I'm  
21 a little -- I'm not exactly tech savvy, but from what I could  
22 read from the reports, they went in there. They tried some sort  
23 of -- whatever mechanism that they use, and they could just --  
24 they just got the file screen. Maybe the Government when they  
25 argue can add a little bit more light to that, but that's my

2:16-cr-00100-GMN-CWH

1 understanding from reading the reports.

2 So we have this laptop. We have in the laptop there is  
3 a SanDisk. There's also another computer. This is all in the  
4 pool house where this material is found, and then outside on the  
5 patio is a hard drive that's a significant amount of -- of child  
6 pornography on it.

7 The only issue is there's the thumb drive that was  
8 found in my client's husband's closet in, I guess for lack of a  
9 better term, a jewelry-box-looking item. So these items,  
10 although he obviously resides there, we would argue that it's  
11 very difficult for the Government to necessarily put him behind  
12 the keyboard, so to speak.

13 Now --

14 THE COURT: Well, it's reasonable to assume that if he  
15 has guests in there all the time and there's something found in  
16 the guesthouse in the pool house, but when there's a thumb drive  
17 in that box in the master bedroom up in the closet, that's  
18 what -- that's what I'm looking at when I consider the weight of  
19 the evidence.

20 MR. MARCHESE: Correct, and I agree with you, but let's  
21 go back and look at the nature of the home. This is a very  
22 large home. You know, this is a his and his, I guess, for lack  
23 of a better term, closet. The closet was not my client's  
24 closet. It's actually his husband's. So I think that that, you  
25 know, changes the argument a little bit as opposed to most

2:16-cr-00100-GMN-CWH

1 people just have one master bedroom closet and, you know, they  
2 have one side and the husband or whoever has the other side. So  
3 that's my argument there, Your Honor.

4 Now turning to the husband and his statements that were  
5 used. The Government takes the position that they can in fact  
6 use his statements. Now, we filed an affidavit that my client's  
7 husband wishes to invoke his spousal testimonial privilege. Now  
8 the Government says, "Well, we still can use that because it's  
9 hearsay and hearsay is allowable at detention hearings," but I  
10 would argue that the analysis goes one step further because the  
11 Defense is placed in a very untenable position when they -- when  
12 the Government takes that position. What I mean by that is,  
13 it's my position that Mr. Fuechtener has a right to -- to due  
14 process, to confront witnesses. Under due process he has the  
15 right to question witnesses.

16 But the problem is when the Government uses these  
17 statements against him and his husband is using the privilege,  
18 we don't have that right. So the Government basically gets  
19 their cake and gets to eat it, too.

20 The only other option for us is to call him as a  
21 witness. And as I cited in my opposition or my reply, excuse  
22 me --

23 THE COURT: That would waive the privilege.

24 MR. MARCHESE: -- there is case law that when you call  
25 the witness, you waive the privilege. So it's our position that

2:16-cr-00100-GMN-CWH

1 that -- those statements should not be made. And even --

2 THE COURT: You also pointed out that when the husband  
3 gave the statement about being upset that the defendant was  
4 looking at pornography that he didn't say it was child  
5 pornography and that he was referring to adult pornography.

6 MR. MARCHESE: That is 100 percent correct, Your Honor.  
7 And, you know, the issue here that -- for us is, if the court  
8 does allow it, that's the argument that we would like to make.  
9 Throughout his one-hour, it's just short of one hour, statement  
10 that he made at the airport, the husband that is, to the FBI, he  
11 categorically denies over and over and over that his husband is  
12 into child pornography. At no point in time does he say  
13 anything like that.

14 Now, I would submit to the court that if someone is  
15 unaware of all of the facts was to look at the criminal  
16 complaint and read that last paragraph, that I could see how it  
17 could possibly be misconstrued or communicated in such a fashion  
18 that my client does in fact watch child pornography when that is  
19 not the case. Those words never came out of his husband's  
20 mouth.

21 So if the court does allow those statements to come in,  
22 I would ask that the court consider it in that fashion because,  
23 yes, he did make statements that his husband watches child --  
24 adult, excuse me, pornography regularly, I would submit to the  
25 court that's nothing more than a red herring given the fact that

2:16-cr-00100-GMN-CWH

1 that is a 100 percent legal activity.

2 Now, morally, we can argue that for days upon end, but  
3 we're not here to talk about morals. We're here to talk about  
4 the law. And in my opinion, I would submit to the court that  
5 under the law it's irrelevant and shouldn't be considered.

6 THE COURT: All right. So let me just make sure that I  
7 understand. There's allegations that in that pool house there  
8 was an Apple iMac.

9 MR. MARCHESE: Correct.

10 THE COURT: So a box computer, for lack of a better  
11 word, right, that had 251 videos and six images of child  
12 pornography. Then outside of the patio of the pool house, I  
13 suppose in the curtilage, I didn't see any photographs, but in  
14 my mind I'm thinking so right outside is 3,235 videos and 105  
15 images that was on the Passport Ultra Exterior Drive. But then  
16 in -- on the thumb drive that's inside that box in the master  
17 bedroom closet of the master bedroom in the closet of --  
18 apparently you're saying they have separate closets, he and his  
19 husband.

20 MR. MARCHESE: Correct, Your Honor.

21 THE COURT: They don't share the one closet. So in the  
22 husband -- in the closet that was used primarily by his husband  
23 that's where the thumb drive is found. And on that thumb drive  
24 the allegation is that -- that thumb drive contained some of the  
25 same images and videos that were provided to the undercover

2:16-cr-00100-GMN-CWH

1 officer by the individual using the name Lars45 in that -- in  
2 that peer-to-peer network communication.

3 MR. MARCHESE: My -- my notes indicate that the shared  
4 files -- there were 12 files on the external hard drive. That  
5 was the one on the ground plugged into the router outside of the  
6 home. I did not make any notes indicating that the thumb drive  
7 had any of those shared files. However, as an officer of the  
8 court, I must -- I feel compelled to let the court know that on  
9 that thumb drive there were some pictures of my client and his  
10 husband and their dog. I'm just -- you know, I just want to be  
11 100 percent and not try to miscommunicate or misconstrue the  
12 facts to the court.

13 THE COURT: All right. So on page 5, lines 13 and 14,  
14 of the Government's brief, which is Number 18 on the docket, it  
15 says that thumb drive contained images and videos depicting  
16 child pornography including some of the same images and videos  
17 provided to the undercover by Lars45.

18 So I take that to mean provided during that time when  
19 they were having the conversation that led to this, I guess, to  
20 the August 3rd, 2015/August 4th, 2015, that timeline with the  
21 peer-to-peer network sharing. Well, we'll hear from Ms. Roohani  
22 and she can fill us in.

23 All right. So anything else that you want to add,  
24 Mr. Marchese?

25 MR. MARCHESE: Court's indulgence.

2:16-cr-00100-GMN-CWH

1 (Defense counsel conferring with defendant.)

2 THE COURT: He's not a U.S. citizen. Did you say he's  
3 a legal permanent resident or what's the standing?

4 MR. MARCHESE: He has an E-2 visa currently, Your  
5 Honor.

6 THE COURT: Okay.

7 I think there was different information provided, and I  
8 looked at a lot of things in this case. There was the pretrial  
9 service report, and I think we have Officer Barlow here who  
10 maybe can clarify this for me. On the first page of the  
11 pretrial service report it says that Mr. Fuechtener stated he  
12 entered the United States in April 2011 on an E-2 Investor Visa  
13 and applied for a green card in 2015. That Immigration and  
14 Customs Enforcement advised the pretrial service department that  
15 the defendant entered the United States on December 14th, 2015,  
16 and is in the process of becoming a legal resident and the  
17 status is pending. I suppose that's not too contradictory, but  
18 it's a little different.

19 OFFICER BARLOW: No, what happens, Your Honor,  
20 sometimes is that -- and I could be corrected by ICE, but when a  
21 person applies or becomes a legal permanent resident, that's  
22 when they mark it as date of entry.

23 THE COURT: Day one, right.

24 OFFICER BARLOW: So ... but that's the status of where  
25 he is right now, pending.

2:16-cr-00100-GMN-CWH

1 THE COURT: All right. Thank you.

2 All right. Anything else, Mr. Marchese, you wanted to  
3 add?

4 MR. MARCHESE: Your Honor, the only other thing I would  
5 say just that I would just reiterate from my original point that  
6 in equity it's my position that I don't think that there's  
7 anything that differentiates my client from all of the other  
8 individuals that had been released on pretrial services in this  
9 jurisdiction. I believe that there are in fact terms and  
10 conditions that can be applied by this court that will, number  
11 one, make his appearance at court and, number two, will not make  
12 him a danger to the community.

13 With that, we will submit it.

14 THE COURT: And I do see on page 5 of the Government's  
15 response that they claim the defendant did admit after being  
16 Mirandized that his e-mail address was in fact  
17 larsschmidt22@hotmail.com, and that was the one where the Skype  
18 account of larsusa22 was created, was using that e-mail.

19 MR. MARCHESE: That is a correct statement, and that  
20 brings up an important point. I am still waiting on  
21 clarification from GigaTribe, but there's a transaction that  
22 goes on on March 21st at 12:31, which is -- I'm assuming it's  
23 military time, and this is where I need to get some of the  
24 clarification for GigaTribe. I have an e-mail out to an  
25 individual. I have not got a response.

2:16-cr-00100-GMN-CWH

1           It's our understanding that these -- that GigaTribe  
2 does their times in what they call UTC Time. I don't know if  
3 the court's familiar with that. I'll be honest, I just learned  
4 it myself.

5           It's seven hours ahead, and the reason that's important  
6 is it would make it at 7:31. March 21st, 2015, was a Saturday.  
7 At 7:31 on March 21st, 2015, my client would have been at work.  
8 So it would have been impossible for him to be the one who is  
9 making these transactions.

10          Now, I haven't gotten 100 percent clarification, but I  
11 will say that in looking at page 128 of the discovery that's  
12 what I've looked at and I've sent it to my expert. He believes  
13 it as well, but I need 100 percent clarification.

14          So the issue here is it's our position that someone  
15 else did this and used his information because we all know that  
16 someone who's into this is obviously going to try to mask their  
17 identity given the serious nature of such charges.

18          THE COURT: And this was 7:30 a.m. or p.m. on March  
19 21st?

20          MR. MARCHESE: It says 12:31, and so we're assuming  
21 that's military time; because if you look at all of the  
22 listings, it would be such as you'd see in a typical police  
23 report. And based upon that that would comport with military  
24 time. That was one of the questions I asked. Is this military  
25 time? And it's our understanding it's also UTC Time. So you

2:16-cr-00100-GMN-CWH

1 have to add seven hours. So basically wherever you're at in the  
2 world would be that same time when you do UTC.

3 Little bit confusing. Like I said, I had to learn it  
4 myself for the first time. And I want to get a clarification  
5 from GigaTribe because they're really the only ones who can tell  
6 me for sure.

7 THE COURT: So it would be 7:30 p.m. or 7:31 p.m.?

8 MR. MARCHESE: Right. Right. And it would be  
9 uncontroverted. I think even the Government would agree that if  
10 it was 7:31 on a Saturday, that Mr. -- my client would have been  
11 on stage.

12 THE COURT: All right. Ms. Roohani?

13 MS. ROOHANI: Thank you, Your Honor.

14 If I may begin briefly with the risk of flight, as  
15 Mr. Marchese began with that argument as well. The Government  
16 has renewed this argument in part based on changed  
17 circumstances. The last time that this matter was before Judge  
18 Leen, Judge Leen did state that she had reason to believe that  
19 the defendant may have been a risk of flight, but that that was  
20 outweighed by his connections to the community and his  
21 employment history.

22 As Your Honor is aware and as Mr. Marchese has  
23 indicated, the -- since then the Tropicana Hotel has terminated  
24 the defendant's employment and, therefore, the Government  
25 submits that that is a changed circumstance before this court.

2:16-cr-00100-GMN-CWH

1 Therefore, the Government believes that the defendant is a risk  
2 of flight, not only based upon the seriousness of the charges  
3 and the penalties that are possible in this case and the  
4 substantial weight of the evidence that I'll speak about in just  
5 a moment, his immigration status, his now lack of ties to this  
6 community, as well as his lack of employment, and also his  
7 financial ability to abscond based on the large amount of money  
8 that he has accessible to him.

9 In terms of danger to the community --

10 THE COURT: Well, let's not -- hold on. Let's move  
11 back to flight risk. So he's saying that he's willing to turn  
12 in his passport and place a monetary bond, cash bond, and that  
13 his husband would be a custodian for him. So why is that not a  
14 set of conditions that would assure his appearance?

15 MS. ROOHANI: Your Honor, without engaging in any  
16 conspiracy theory, the large amount of money available to the  
17 defendant as well as his ties to Germany, the fact that he has  
18 parents there, he has an excellent relationship with his  
19 parents, and facing the charges and the amount of time that he's  
20 facing if he -- if he's convicted on these charges, the  
21 Government submits that that is sufficient -- it is Your Honor's  
22 determination whether there is a condition or combination of  
23 conditions, but it's our position that there is no combination  
24 of conditions that could assure that he will appear and not  
25 leave the country.

2:16-cr-00100-GMN-CWH

1                   In terms of being a danger to the community,  
2 Mr. Marchese focussed largely on the weight of the evidence,  
3 which as Your Honor knows is the least important factor. There  
4 are other -- two other factors at least that weigh heavily in  
5 favor of detention, specifically the nature and circumstances of  
6 the offense charged, the seriousness of the charges of  
7 possession, receipt, distribution, and advertising of child  
8 pornography. Counts Two and Three carry a mandatory minimum of  
9 five years and up to 20 years of imprisonment. Count Four  
10 carries a mandatory minimum of 15 years of imprisonment and up  
11 to 30 years.

12                   And the other element that weighs heavily in favor  
13 of -- the other factor that weighs heavily in favor of detention  
14 is the nature and seriousness of the danger to the community,  
15 the fact that the defendant possessed, received, and distributed  
16 disturbing graphic images of very young children being brutally  
17 raped and also sexually abused both by adults and also that  
18 adults had set up other children to engage in sex acts with one  
19 another.

20                   The Skype chats which Mr. Marchese has not identified  
21 show the defendant's willingness to conspire with another adult  
22 to commit a crime against a child where the defendant -- we  
23 submit lars20 -- usa22 which was registered with the e-mail  
24 address the defendant admitted was his -- was attempting to  
25 coordinate a viewing of a father having sex with his daughter.

2:16-cr-00100-GMN-CWH

1 In exchange larsusa22 would masturbate on the Skype chat for the  
2 other viewer to -- to see. And also in exchange that the Lars45  
3 GigaTribe folder that contained child pornography that was  
4 downloaded by the agent in the preliminary investigation would  
5 be available for the other user to download.

6 Further, the sheer --

7 THE COURT: What about the argument -- and I'm sorry I  
8 didn't even mention this with you, Mr. Marchese, but in the  
9 Defense motion was that this exchange of information included  
10 the viewing of a woman having sex with the man and that he's  
11 homosexual and so, for lack of a better word, would not  
12 necessarily be aroused by watching a man having sex with a  
13 woman. And so that it's not likely that he was the one that was  
14 requesting that type of a viewing in exchange for sharing the  
15 child pornography that he had.

16 MS. ROOHANI: Your Government -- Your Honor, the  
17 Government submits that there is no scientific or any other type  
18 of evidence that shows that homosexuals might only view  
19 homosexual pornography or heterosexuals might only view  
20 heterosexual pornography. Furthermore, based on child  
21 pornography, as Your Honor is well aware, the younger the child  
22 the more asexual these children might appear.

23 It's unclear based upon the Skype chats the age of the  
24 daughter. However, the Government submits that that child is  
25 absolutely a minor because the other user talks about shuttling

2:16-cr-00100-GMN-CWH

1 the child back and forth between the mother's house and the  
2 father's house.

3 On that basis, without anything further, Your Honor, I  
4 think that that at least suggests that the defendant is willing  
5 to engage in this type of behavior.

6 Furthermore, the fact that the defendant was willing to  
7 exchange a thing of value, the sharing of child pornography  
8 through the Lars45 folder, and as well as the fact the defendant  
9 was willing to masturbate for the other viewer to see, which of  
10 course the other viewer is a male so there is some type of  
11 homosexual arousal, if you will, Your Honor.

12 Finally, turning to the weight of the evidence. I'd  
13 like to clarify a little bit of what Mr. Marchese was talking  
14 about. There's over 4,000 images and videos of child  
15 pornography found throughout the house, not only in the casita,  
16 but also in the main house, in the master bedroom closet on a  
17 thumb drive, and also on a device in the kitchen. The thumb  
18 drive that was found in the closet, as Your Honor has noted, did  
19 include the same -- at least 12 to 14 of the same files that  
20 were downloaded by the agent in a Lars45 folder on the thumb  
21 drive. The thumb drive also included photos of the defendant,  
22 the defendant's husband, and their dog.

23 As Your Honor's aware of how thumb drives work, you  
24 have to plug them into a computer, intentionally move the files  
25 onto the thumb drive, the thumb drive has to be then removed

2:16-cr-00100-GMN-CWH

1 from the computer, and then placed wherever it's going to be  
2 placed. That's not accidental. The photos did not magically  
3 appear on the thumb drive and then end up in the master bedroom  
4 closet.

5 Furthermore, Your Honor, based on the statement of the  
6 husband which I'll address in a moment why I believe that the  
7 court should consider the statements of Mr. Alfster. Mr. Alfster  
8 did make a statement to the agent that he does not know how to  
9 use a thumb drive, he has not used it in the past, and that the  
10 defendant is the person who would be able to use the thumb  
11 drive.

12 As I've talked about both the Lars45 folder as well as  
13 the Skype chats were set up and done by the e-mail address that  
14 the defendant has admitted was his.

15 In -- I'm sorry. I just wanted to clarify, Your Honor.  
16 The child pornography that was found on pause, the photo that is  
17 part of the search warrant that has been turned over in  
18 discovery, the child pornography is on the background. We can  
19 see the file name at the top, and then there is the lock screen  
20 where the user has to login. That piece of child pornography  
21 has been verified as being on that device. So it was on pause,  
22 but you can sort of see the edges of the -- of the child  
23 pornography in terms of that being done.

24 Also, the --

25 THE COURT: I'm not finding -- and I realize I don't

2:16-cr-00100-GMN-CWH

1 have everything. I just have a couple of motions and responses  
2 here, but I don't have anything showing that there was -- there  
3 were videos found in the kitchen.

4 MS. ROOHANI: I do have a forensic report. I have  
5 provided a copy to Mr. Marchese. I'm happy to provide a copy to  
6 the court for that, but there is a device that was titled -- if  
7 you'd give me one moment, Your Honor.

8 The device 1B16 is a damaged Macro Pro screen. It was  
9 found in the kitchen in the main house. There's two users  
10 identified -- sorry -- three users identified on it: a guest, a  
11 shared, and Jan Rouven, which as Your Honor knows is the  
12 defendant, as well as an attached 500 gigabyte hard drive. On  
13 that device was found a file name that matched both the -- a  
14 file name that was found on a device found in -- two devices  
15 found in the casita as well as on the thumb drive.

16 I'm happy to provide --

17 THE COURT: A file name that was indicative of child  
18 pornography?

19 MS. ROOHANI: Yes, it's Boy Scout Sexual Acts, Your  
20 Honor.

21 THE COURT: And that was found in the kitchen?

22 MS. ROOHANI: That was found in the kitchen in the main  
23 house, yes.

24 THE COURT: All right. Thank you. I'm sorry to  
25 interrupt you. I just --

2:16-cr-00100-GMN-CWH

1 MS. ROOHANI: No, that's fine, Your Honor.

2 In terms of the consideration of the husband's  
3 statements, I think that Mr. Marchese has to admit that the  
4 spousal privilege simply doesn't apply in this case at this  
5 time. The Government has not sought to call Mr. Alfter. And as  
6 Your Honor knows, hearsay doesn't apply in detention hearings.  
7 Therefore, Your Honor may consider it.

8 However, if I may have an opportunity to respond to the  
9 new argument that was raised for the first time in reply, the  
10 due process argument. There's two reasons why the line of cases  
11 that the defendant cites should not be followed by the court.  
12 First, supervised release -- two legal reasons at least.  
13 Supervised release violation hearings, as Your Honor knows, are  
14 completely different than detention hearings. Your Honor would  
15 be tasked with actually making a determination of guilt in a  
16 supervised violation hearing. And, further, the second legal  
17 point, they're governed by two completely different statutes and  
18 different rules of criminal procedure.

19 Factually speaking, even if Your Honor was inclined to  
20 follow that line of reasoning, the Comito case and its progeny  
21 are simply not relevant to what's happening here. In Comito the  
22 only evidence of the violation was the hearsay statement. As  
23 we've talked about before, between the Skype chats, the  
24 excessive amount of child pornography that was found all over  
25 the house, and the fact that it was tied to the defendant is

2:16-cr-00100-GMN-CWH

1 sufficient by itself to support detention in this case.

2 And, second, in Comito the statements did not have any  
3 indicia of reliability, and in this case they do. Not only was  
4 Mr. Alfter Mirandized, but he waived Miranda. The agents  
5 explained the nature of the investigation and the nature of the  
6 items that they found in the house with the child pornography,  
7 and only then did Mr. Alfter make the statements. So,  
8 therefore, the Government submits that it has indicia of  
9 reliability.

10 Mr. Marchese talks about how the Government would like  
11 to have its cake and eat it, too, but the same is then true for  
12 the defendant. He would like to assert the spousal privilege  
13 and then also not have us consider any of the statements that  
14 were said. So he can't also have his cake and eat it, too.

15 If -- we submit, Your Honor, that the correct analysis  
16 on whether to consider the statements of Mr. Alfter is properly  
17 done under a cost/benefit analysis as laid out in a brief as set  
18 forth in Leon. However, if for any reason Your Honor is  
19 uncomfortable looking at Mr. Alfter 's statements in any regard,  
20 there's more than enough other evidence that you can rely --  
21 rely on and make the detention determination based on that.

22 Finally, Your Honor, in any event, Mr. Alfter's  
23 statements go to the weight of the evidence. Those statements,  
24 even if given little to no weight, are -- that -- that factor's  
25 already heavily tipped in favor of detention and it's already

2:16-cr-00100-GMN-CWH

1 the least important factor. And I think that there's rebuttable  
2 presumption in this case, and the defendant simply has not  
3 rebutted that presumption.

4 THE COURT: All right. Thank you.

5 MS. ROOHANI: Thank you, Your Honor.

6 THE COURT: So, Mr. Marchese, were you provided with  
7 any evidence -- and don't tell me if you think it's -- just is  
8 there something in the kitchen also that was found with child  
9 pornography?

10 MR. MARCHESE: That is correct. There was a computer,  
11 and as I pointed out earlier there was several items taken, but  
12 there was a computer with a damaged screen. So I don't know to  
13 what extent the damage was, but I don't even -- from what I've  
14 been represented, they can't -- they couldn't even -- you  
15 couldn't even view it. But there was -- that is correct. There  
16 was one item found. It was the MacBook Air laptop.

17 THE COURT: All right. So it was a laptop which is ...

18 MR. MARCHESE: That is correct. It wasn't Mr. --

19 THE COURT: ... transportable, for lack of a better  
20 word.

21 MR. MARCHESE: Correct. And it was not the computer  
22 that my client used on a regular basis. And with the nexus to  
23 my client is obviously this Lars45, and that's where the dispute  
24 between the parties arises. That's when I brought up the  
25 GigaTribe and the timing and all that. The Lars45, this is the

2:16-cr-00100-GMN-CWH

1 individual who's -- it's our position that is the one who is  
2 doing these downloads and transfers, et cetera.

3 THE COURT: But the defendant does admit that he used  
4 an e-mail that had the name Lars in it as well.

5 All right. Well, the court has considered the parties'  
6 briefs, oral arguments, the factors set forth in 3142(g). The  
7 presumption does apply. The original presumption is not erased  
8 when the defendant offers evidence to rebut it, but the  
9 presumption does remain in the case as an evidentiary finding  
10 that goes against release and it is weighed with all of the  
11 other relevant factors in 3142(g).

12 The court does find by a preponderance of the evidence  
13 that the defendant is a flight risk. His family ties out of the  
14 country in Germany along with the now indictment that he is  
15 facing where a jury has found probable cause to believe that he  
16 has committed at least four different counts. Two of the counts  
17 have a five-year minimum. One of the counts, Count Four, has a  
18 15-year minimum. So we're looking at 20- and 30-year maximum  
19 sentences, but regardless minimums. He's got Counts Two and  
20 Three have a five-year minimum, and Count Four has a 15-year  
21 minimum. Is that right, Ms. Roohani?

22 MS. ROOHANI: That is correct, Your Honor.

23 THE COURT: All right. Well, his travel history from  
24 the pretrial service report is pretty long, and he does travel  
25 quite often out of the country and has for some time, which is

2:16-cr-00100-GMN-CWH

1 not really unusual for someone who's from Europe and not the  
2 United States, but it's sort of like us traveling from one state  
3 to another. You know, it's a very natural thing, but  
4 unfortunately makes it -- so he has a lot of ties and a lot of  
5 places he could go.

6 I agree that having had the employment at the time that  
7 Judge Leen made the original decision probably factored in as  
8 well as the fact that there wasn't an indictment yet. Now  
9 there's an indictment and he's lost his employment here in the  
10 United States which will make it more difficult for him to  
11 remain here, especially if he has to post a cash bond. So I  
12 don't think that those combinations of conditions that were  
13 discussed earlier would be sufficient to make the -- the court  
14 comfortable that he would be -- that we could assure that his  
15 appearance would actually occur as required.

16 Looking at the danger to the community, I do also find  
17 that the clear and convincing standard has been met. I agree  
18 that the weight of the evidence is by case law the least of the  
19 important factors that we look at. That's a 1985 case, but  
20 nonetheless that is what they tell us. But there's a  
21 significant amount of child pornography here and we don't need  
22 to get into the details. I think we all feel uncomfortable with  
23 it, but there's some very graphic, very violent descriptions  
24 provided to the court of what the pornography was and the acts  
25 that were being done to these children who could be heard

2:16-cr-00100-GMN-CWH

1 whimpering and crying as they were being anally penetrated,  
2 children as young as two and three.

3 One of the videos being on pause at the time that the  
4 computer was seized indicates that this is not something old,  
5 but something that is occurring as well as the Skype chat that  
6 it appears someone, which may or may not be the defendant, but  
7 because it's his home and there's so much of it all over the  
8 place -- I could see overlooking one computer in the pool house  
9 where he doesn't go in and only his guests are there and so  
10 forth. That that might actually be helpful, but it's all over  
11 the place. Now we know it's even on a laptop in the kitchen,  
12 the thumb drive in the bedroom closet in a box that also has  
13 other videos that include the defendant and his husband with an  
14 animal.

15 And so the weight of the evidence does -- does indicate  
16 that there is a danger to the community as well as the nature  
17 and circumstances of the offense, the severity of the offense,  
18 the sentence that he's looking at.

19 He does have no known criminal history. His history  
20 and characteristics, his -- in this community in the very short  
21 time that he's been here appear to have been without any  
22 indication that he would be posing or potentially posing a  
23 danger to the community. However, it is a very short period of  
24 time that he's been in the community.

25 Applying the cost/benefit analysis in Leon, it does

2:16-cr-00100-GMN-CWH

1 appear to the court that there is a danger to the community. So  
2 the defendant accordingly shall remain detained pending trial.  
3 He will be committed to the custody of the U.S. Marshal Service  
4 for confinement in a correctional facility with a reasonable  
5 opportunity for private consultation with counsel.

6 If you wish to appeal, you do have pursuant to Section  
7 3145(c) only 30 days to file your appeal. If you can't afford  
8 an attorney, the court will appoint one for you. And if you  
9 can't afford a copy of the court transcript, it will be prepared  
10 for you at the Government's expense.

11 Anything else, Ms. Roohani, that you need me to address  
12 at this time?

13 MS. ROOHANI: No, Your Honor.

14 THE COURT: Mr. Marchese?

15 MR. MARCHESE: Yes, Your Honor. It's not necessarily  
16 in reference to detention, but in reference to discovery I just  
17 wanted to make a record that tomorrow I'm going to be sending a  
18 letter over to the United States Attorney's Office. They have  
19 given us an initial batch of discovery. However, my expert has  
20 been trying to procure I believe they're called E01's from the  
21 FBI which he's been unable to procure. And unfortunately it  
22 kind of leaves him in limbo. He's unable to do his job.

23 There are also some other odds and ends that I feel  
24 might be missing from the discovery. So I'm just making a  
25 record. I'll send a letter over tomorrow. I've dealt with

2:16-cr-00100-GMN-CWH

1 Ms. Silva before. She's always been above board with these  
2 sorts of issues. Nobody wants to file a motion. If we have to,  
3 we will, but I'm confident we will be able to work it out.

4 THE COURT: Ms. Silva, are you aware of any EOIs from  
5 the FBI?

6 MS. SILVA: Yes, Your Honor. I actually received a  
7 copy of the request and we are working on that. The items need  
8 to be forensically preserved before we can produce that. It's  
9 my understanding that at least seven of the items are ready, and  
10 so there will be -- I'll be in contact with Mr. Marchese, and  
11 we'll get that taken care of.

12 THE COURT: Okay.

13 MS. SILVA: And as they get produced, we'll continue to  
14 let him know when they're ready.

15 THE COURT: All right. Thank you.

16 Anything else, Mr. Marchese?

17 MR. MARCHESE: That is it, Your Honor. Thank you.

18 THE COURT: All right. Well, thank you very much.  
19 Both counsel prepared the issues very well and did a very good  
20 job at oral argument as well. It's a difficult case, a painful  
21 case, but I appreciate the professionalism of both counsel.  
22 Thank you very much.

23 MR. MARCHESE: Thank you.

24 MS. ROOHANI: Thank you, Your Honor.

25 THE COURT: We're in recess.

2:16-cr-00100-GMN-CWH

1 (Whereupon the proceedings concluded at 11:57 a.m.)

2 --oo--

3 I, Patricia L. Ganci, court-approved transcriber, certify  
4 that the foregoing is a correct transcript transcribed from the  
5 official electronic sound recording of the proceedings in the  
6 above-entitled matter.

7

8 /s/ PATRICIA L. GANCI  
Patricia L. Ganci

MAY 5, 2019  
Date

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25